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No. 85-98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & CO., GMBH,
Petitioner,

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, on an application for discovery of evidence located abroad from a foreign national over whom the court has personal jurisdiction, a court in the United States may avoid the procedures of the Hague Evidence Convention * by ordering that the production of the foreign documents or the examination of the foreign witnesses take place in the United States rather than in the territory of the foreign state that is a party to the Convention.

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* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and Germany on June 26, 1979).

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MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Anschuetz & Co., GmbH ("Anschuetz") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.[1]

OPINIONS BELOW

The judgment of the court of appeals (App. A) is reported at 754 F.2d 602; the opinion and order of the district court (App. B) are unreported; the ruling of the magistrate (App. C) is unreported.

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[1] The parties below included plaintiffs Mississippi River Bridge Authority, Boh Brothers Construction Co., and Landis Construction; defendants M/V *Pola de Lena*, Compania Gijonesa de Navegacion, S.A., and petitioner Anschuetz; and nominal respondent Federal District Court Judge the Honorable George Arceneaux, Jr. Anschuetz is a subsidiary of Carl Zeiss Stiftung and, in turn, owns all of the shares of Anschuetz Co. of America.

JURISDICTION

The judgment of the court of appeals was entered March 7, 1985. On petitioner's application, Justice White ordered the time for filing a petition for writ of certiorari extended to July 17, 1985. This Court has jurisdiction to issue the requested writ under 28 U.S.C. § 1254 (1) (1983).

STATUTORY AND TREATY PROVISIONS INVOLVED

28 U.S.C. § 1254(1) (1983) provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

The pertinent provisions of Rules 30 and 34 of the Federal Rules of Civil Procedure are reproduced at App. D.

The provisions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and Germany on June 26, 1979), are reproduced at App. E.

STATEMENT

This petition arises from a factual circumstance confronting federal and state trial courts with increasing frequency: A litigant in a civil action seeks wide-ranging discovery from a foreign litigant of documents and persons located abroad, relying on federal or state discovery procedures and avoiding the discovery procedures of the Hague Evidence Convention. Although the Convention provides for various methods to be used to obtain evidence voluntarily from abroad, it is the letter of request procedure established by Chapter I of the Convention that

typically is available to the litigant seeking foreign discovery. Under the Convention, countries such as the United States and Germany have agreed that letters of request will "be executed expeditiously", Art. 9 (App. E at 49a), with "appropriate measures of compulsion", Art. 10 (App. E at 49a), subject only to certain narrow exceptions.

In this case, the discovery of evidence abroad was sought under the Federal Rules of Civil Procedure in a tort case arising out of a maritime collision on the Mississippi River. On February 3, 1979, the Spanish ocean-going vessel, the M/V *Pola de Lena*, collided with a ferry landing, damaging two ferryboats and the landing. On February 6, 1979, the owner of the landing, the Mississippi River Bridge Authority (later joined by two construction companies doing work on the landing) brought suit in Federal District Court for the Eastern District of Louisiana, seeking damages from the ship, its Spanish owner, its Spanish charterer and operator, and two unnamed foreign insurance companies. The jurisdiction of the federal court was invoked pursuant to 28 U.S.C. § 1333 (1983) (admiralty and maritime jurisdiction). Anschuetz was subsequently added as a third-party defendant because from its facilities in Germany it furnished some of the steering control equipment for the *Pola de Lena*.

The trial court proceedings began by resolving questions of personal jurisdiction over Anschuetz and over the shipyard in Spain where the *Pola de Lena* had been built. In the course of resolving these issues, Anschuetz provided substantial discovery to plaintiffs in response to 61 written interrogatories, 33 requests for production of documents, and two notices of depositions. The District Court ultimately found that it had personal jurisdiction over Anschuetz, but not over the shipyard.

In October 1983, Gijonesa served Anschuetz with ten new written interrogatories, 48 extensive requests for

production of documents from Germany,[2] and notices for depositions of Anschuetz and several of its employees, to be held in Germany, all purporting to seek information pertaining to the merits of plaintiffs' claims. Anschuetz sought a protective order from the magistrate against this new wave of discovery, on the grounds of repetition, overbreadth, and burden. After the magistrate rejected this request for a protective order, Anschuetz appealed the ruling to the district court, asserting among other things that the discovery ordered would violate provisions of the Hague Evidence Convention. On April 13, 1984, the district court upheld the magistrate's order, ruling that the procedures of the Convention need not be followed in seeking discovery from a party over whom the court has personal jurisdiction (App. B). After the magistrate and the district court refused to reconsider their rulings, Anschuetz on April 19, 1984, petitioned the United States Court of Appeals for the Fifth Circuit for a writ of mandamus requiring the district court to vacate or stay its discovery order. The court of appeals stayed the order pending its decision on the petition and invited full briefs from the Governments of the Federal Republic of Germany and the United States, as well as from the parties.

In its brief to the court of appeals, the Federal Republic of Germany urged that the Hague Convention is the exclusive means by which United States litigants

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[2] A few examples illustrate the breadth of these document requests: all documents relating to the design, testing, inspection, steering emergencies, assembly, installation, or integration of Anschuetz products installed on ships before their "going to sea" from 1974 to the present; all documents relating to the design, testing, inspection, assembly, installation, or integration activities to be performed by third parties to enable Anschuetz to sign certificates; all documents relating to information given Anschuetz representatives concerning negotiation of contracts on behalf of Anschuetz between 1974 and 1983; and all information Anschuetz gave its representatives for conduct of Anschuetz business.

can obtain evidence from Germany and that "[c]ompliance in Germany with the order of the U.S. District Court mandating the taking of oral depositions in Kiel, Germany, and the production of documents located in Kiel, Germany, would be a violation of German sovereignty unless the order is transmitted and executed by the method of Letter of Request under the Evidence Convention." [3] The German Government further indicated its past cooperation with United States courts in obtaining evidence from within its territory and its intention to continue to cooperate fully with United States courts.[4]

The United States took the position that the Hague Convention is not the exclusive means by which United States litigants can obtain evidence from abroad. In light of the German Government's submission that an order to produce documents located in Kiel would violate German sovereignty, however, the Justice Department stated that the district court should "reconsider that order and . . . apply a careful comity analysis." [5] It argued further that the district court could not order depositions to be conducted in Germany without following procedures to which the German Government had consented under the Hague Convention or other international treaty.

On March 7, 1985, the court of appeals denied Anschuetz' mandamus petition. In its opinion, the court discussed some thirteen federal and state courts' decisions that range from avoiding the Convention as much as possible to requiring use of Convention discovery procedures. In this case, the court of appeals sided with those courts that have avoided the Convention, holding that the

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[3] Brief of the Federal Republic of Germany as Amicus Curiae at 8, *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985) ("German *Anschuetz* Brief").

[4] *Id.* at 10-13.

[5] Brief of the United States as Amicus Curiae at 7, *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985).

"Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules." 754 F.2d at 615 (App. A at 26a). The court of appeals recognized an unavoidable role for the Hague Convention procedures in only two circumstances: "the involuntary deposition of a party conducted in a foreign country, and . . . . the production of documents or other evidence gathered from persons or entities in the foreign country who are not subject to the court's *in personam* jurisdiction." *Id.* In keeping with these principles, the court of appeals advised the district court to review its earlier discovery order, which had provided in part for involuntary depositions in Germany. According to the court of appeals, "the court can order the production of documents and the examination of witnesses to occur in the United States to avoid any infringement upon German sovereignty." *Id.* at 27a.

REASONS FOR GRANTING THE WRIT [6]

This case presents a question of increasing importance in the administration of justice within the federal and state court systems: when and to what extent litigants must use the procedures of the Hague Evidence Convention to obtain evidence from the territory of nations that, with the United States, have signed and ratified the Hague Evidence Convention. Because they have not yet received guidance from this Court on the question, the lower federal courts and the state courts are issuing a growing number of confusing and contradictory decisions. As a result, the effects of the Convention for individual litigants turn upon the particular forum in

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[6] The question presented by this case and the reasons for granting the writ are substantially the same as the question and reasons presented by the petition for writ of certiorari in *Messerschmitt Bolkow Blohm, GmbH v. Walker*, No. 85-99 (petition for writ of certiorari filed July 17, 1985).

which they happen to appear. Moreover, the decision of the court of appeals in this case will intensify international conflicts over evidence-gathering in United States proceedings and is unnecessary to protect the right of United States litigants to have a fair hearing on their claims. This Court should grant certiorari in order to put an end to the confusion and to establish the Convention as an effective means for reconciling the United States system of litigation with the legal systems of our trading partners and allies.

I. What Role the Hague Evidence Convention Has in United States Litigation Is an Important Question.

The appropriate role of the Hague Evidence Convention in U.S. litigation is a question of undeniable importance to the administration of justice in federal and state courts. The Hague Evidence Convention creates procedures by which United States litigants in civil cases can obtain evidence from abroad from states that are parties to the Convention. Some of the most important trading partners of the United States have ratified the Convention, including the United Kingdom, the Federal Republic of Germany, France, Italy, Sweden, the Netherlands, Israel, Denmark, and Norway. The growth of international trade has caused a dramatic increase in the number of cases in United States federal and state courts involving parties from these countries.

The Hague Evidence Convention played a minor role in United States litigation with foreign nationals until a growing number of nations had ratified the Convention. Indeed, the first reported U.S. cases in which litigants urged that the Hague procedures be used for obtaining foreign evidence came from the California appeals court in 1981 and 1982, a decade after United States ratification in 1972.[7] In the last three years, however, the num-

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[7] *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 288, 186 Cal. Rptr. 876 (1982); *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981).

ber of reported cases in which courts have addressed the need to resort to the procedures of the Hague Evidence Convention has been increasing rapidly, with at least nine cases in 1983,[8] at least twelve cases in 1984,[9] and at least six cases decided already in 1985.[10] These cases

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[8] *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983); *Wilson v. Stillman & Hoag, Inc.*, 476 N.Y.S.2d 764 (1983); *Schroeder v. Lufthansa German Airlines*, No. 83 C 1928 (N.D. Ill. Sept. 15, 1983) (memorandum opinion); *Thompson v. Continental Machine & Tool Co.*, No. EC 81-181-LS-P (N.D. Miss. Sept. 21, 1983); *Miller v. Hawes Firearm Co.*, No. F82-036 (D.Alaska Oct. 13, 1983); *Cannon v. Arburg Maschinenfabrik*, No. 80 L 2275 (Ill. Cir. Ct. July 21, 1983); *Van Dongen v. Arburg Maschinenfabrik*, No. L-71021-81 (N.J. Super. Ct. July 1, 1983); *Angulo v. Kedzep Ltd.*, 29 Bankr. 417 (S.D. Tex. 1983).

[9] *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984); *McLaughlin v. Fellows Gear Shaper Co.*, 102 F.R.D. 956 (E.D. Pa. 1984); *International Society for Krishna Consciousness, Inc. v. Lee*, 425 F. Supp. 681 (S.D.N.Y. 1984); *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984); *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D.Vt. 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op. (S.D.N.Y. May 30, 1984); *General Electric Co. v. North Star Int'l*, No. 83 C 0838 (N.D. Ill. Feb. 21, 1984) (memorandum opinion and order); *Worthington v. Polymer Machinery Corp.*, No. 83-2131 (E.D. Pa. Jan. 12, 1984); *Th. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443 (Tex. Ct. App. 1984); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686 (1984); *Compagnie Francaise d'Assurance v. Phillips Petroleum Co.*, No. 81 Civ. 4463 (S.D.N.Y. Dec. 10, 1984).

[10] *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985); *In re Messerschmitt Bolkow Blohm, GmbH*, 757 F.2d 729 (5th Cir. 1985); *Laker Airways Ltd. v. Pan American World Airways*, No. M. 8-85, slip op. (S.D.N.Y. Mar. 22, 1985); *Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher*, No. 16562 (W. Va. Mar. 22, 1985); *Performance Indus., Inc. v. Honda Motor Co., Ltd.*, No. 83-4863, slip op. (E.D. Pa. Mar. 1, 1985); *Griffis v. Aerospatiale Helicopter Corp.*, No. A83-602 (D.Alaska June 4, 1985) (order).

are, of course, only the tip of the much larger iceberg of unreported decisions usually rendered in discovery disputes. With respect to German companies alone, petitioner estimates that there are currently about 1,500 cases pending in the U.S. courts in which German companies are parties and in which the discovery of foreign evidence is an issue.[11]

As a reflection of the growing importance of the dispute among the lower courts over the role of the Hague Convention in U.S. litigation, this Court was twice asked recently to address this question. In the first case, *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 1260 (*appeal dismissed*), *reh. denied*, 104 S. Ct. 1932 (1984), a Michigan trial court ordered the German defendant to make its employees available for deposition by U.S. counsel in Germany before U.S. consular officials. On appeal from the Supreme Court of Michigan, the appellee defended this order as lawful under an exchange of diplomatic notes verbale between the United States and Germany covering consular depositions and under the provisions of the Hague Evidence Convention. The Court asked for the views of the Solicitor General on these questions.[12]

In his brief of December 19, 1983, the Solicitor General set forth the position of the United States government that the Hague Evidence Convention "deals com-

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[11] A substantial scholarly literature now exists on the Convention and its role in U.S. litigation. Particularly insightful is Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733 (1983).

[12] *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 62 (1983). By the time the notice of appeal was filed, this Court had already acted twice to stay the threatened depositions, first by order of the Chief Justice before the Michigan Supreme Court's decision (*Volkswagenwerk A.G. v. Falzon*, No. A-191, O.T. 1981 (Aug. 23, 1982), *motion to vacate denied*, Sept. 2, 1982), and second by Justice O'Connor after the Michigan Supreme Court declined to hear the case (*Volkswagenwerk A.G. v. Falzon*, 103 S. Ct. 1810 (1983)).

prehensively with the methods available to United States courts and litigants to obtain proceedings abroad for taking evidence," [13] that the "parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted," [14] and therefore that the noticed depositions were contrary to the Convention.[15] The Solicitor General further rejected the assertion that the state trial court could order the defendant to submit to the depositions despite the provisions of the Convention simply because it had personal jurisdiction over the defendant.[16] Nevertheless, the Solicitor General urged the Court not to review *Falzon* on the merits because the U.S. government had ordered its consular officials not to cooperate with plaintiff's counsel, thereby making the depositions impossible as a practical matter.[17] This fact, as well as the relative infrequency of U.S. courts' ordering depositions to be taken abroad, made *Falzon* an unsuitable vehicle for this Court to rule upon the role of the Hague Evidence Convention in U.S. litigation, and on February 21, 1984, the Court dismissed the appeal.[18] Neither of these considerations applies to the present case, where no intervention by the U.S. government will make the issue moot and what is at issue is the much more common practice of compelling foreign nationals to bring their documents and personnel to the United States.

The second recent case in which questions concerning the role of the Hague Evidence Convention were brought

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[13] Brief for the United States as Amicus Curiae at 5, *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 1260 (*appeal dismissed*), *reh. denied*, 104 S. Ct. 1932 (1984).

[14] *Id.* at 6.

[15] *Id.* at 7.

[16] *Id.* at 7, n.3.

[17] *Id.* at 11-12.

[18] *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 1260 (*appeal dismissed*), *reh. denied*, 104 S. Ct. 1932 (1984).

to this Court was *Club Mediterranee, S.A. v. Dorin*, 105 S. Ct. 286 (1984) (*appeal dismissed and cert. denied*). In that case a New York state trial court had ordered a French defendant to answer interrogatories despite the defendant's claim that at least some of the information required by the interrogatories would have to come from France, which by law prohibited disclosure of information to courts outside France except where the information was sought through the mechanisms of the Hague Evidence Convention. Once again the Court called for the views of the Solicitor General.[19] The Solicitor General stated that the case presented "important questions concerning the proper procedures to be followed by United States courts in ordering discovery where the party from whom discovery is sought claims that the information necessary to respond to the discovery request is located in a foreign state that is a party to the Hague Evidence Convention." [20] Nevertheless, the Solicitor General urged the Court not to grant certiorari because the courts below had not made express findings sufficient for adequate review, particularly as to whether the French government had any objection to the particular discovery sought in that case.[21] The Court followed the suggestion of the Solicitor General, dismissing the appeal and denying the petition in the alternative for certiorari.[22] Once again, however, the Court's failure to grant plenary review in *Club Med* in no way reflects on the importance of the question presented or on the appropriateness of the present case as the vehicle for addressing this question. Here there is a fully developed record, including a clear

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[19] *Club Mediterranee, S.A. v. Dorin*, 104 S. Ct. 1268 (1984).

[20] Brief for the United States as Amicus Curiae at 3, *Club Mediterranee, S.A. v. Dorin*, 105 S. Ct. 286 (1984) (*appeal dismissed and cert. denied*).

[21] *Id.* at 14.

[22] *Club Mediterranee, S.A. v. Dorin*, 105 S. Ct. 286 (1984) (*appeal dismissed and cert. denied*).

expression of the German government's objection to the discovery ordered.

II. Lower Federal and State Courts Are Sharply Divided Over the Role of the Hague Evidence Convention in United States Litigation.

The lower federal and state courts are far from reaching a consensus view—or even a majority rule—on whether or in what circumstances the Hague Evidence Convention procedures should be used by United States litigants seeking evidence from abroad. Several courts have concluded, as the West Virginia Supreme Court did in a carefully-reasoned decision handed down less than a month after the ruling of the court of appeals in the instant case, that the procedures of the Hague Evidence Convention must be used in the first instance when a United States litigant seeks to compel a party to produce documents, answer interrogatories, or make witnesses available from abroad.[23] Other courts have concluded, as the court of appeals did here, that the Hague Evidence Convention simply does not apply to discovery of evidence from abroad, so long as the United States court orders that the production of the evidence take place in this country—even though the party is compelled to gather the evidence abroad and transport it to this country.[24] At the extremes, some courts have

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[23] *Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher*, No. 16562 (W. Va. Mar. 22, 1985); *Th. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443 (Tex. Ct. App. 1984); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686 (1984); *General Electric Co. v. North Star Int'l, Inc.*, No. 83 C 0838 (N.D. Ill. Feb. 21, 1984) (memorandum opinion and order); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982).

[24] *International Society for Krishna Consciousness, Inc. v. Lee*, 425 F. Supp. 681 (S.D.N.Y. 1984); *Cooper Indus., Inc. v. British*

ruled that the Hague Evidence Convention is the exclusive means of obtaining evidence from abroad;[25] other courts have ruled that they need not follow Convention procedures even in ordering inspections or interviews on foreign territory.[26]

While there is widespread conflict and disagreement in the lower federal and state courts over the Hague Evidence Convention's impact on discovery of evidence located abroad, the very nature of the issue presented makes its review in plenary decisions of courts of appeals a relatively rare phenomenon: Discovery disputes do not often survive trials on the merits and interlocutory review by writ of mandamus is by its very nature extraordinary and difficult to obtain. At the same time, the large number of conflicting decisions demonstrates both the importance of the matter and the need for definitive appellate guidance. With the Court of Appeals for the Fifth Circuit now squarely in conflict with the Supreme Court of West Virginia[27] and other state courts, only a ruling by this Court can resolve the divergent positions.

Aerospace, Inc., 102 F.R.D. 918 (S.D.N.Y. 1984); *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op. (S.D.N.Y. May 30, 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D.Vt. 1984); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983).

[25] *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 (Conn. Super. Ct. July 22, 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention).

[26] *See Volkswagenwerk A.G. v. Falzon*, Nos. 77-722-371 NP, 78-803-043 NP (Mich. Cir. Ct. Oct. 7, 1980) (order permitting plaintiffs to attempt to take depositions of German citizens in Germany).

[27] *Gebr. Eickhoff Maschinenfabrik unde Eisengieberei v. Starcher*, No. 16562 (W. Va. Mar. 22, 1985).

III. The Court of Appeals in the Present Case Seriously Misapprehended the Role of the Hague Evidence Convention in United States Litigation.

In addition to the importance of the question presented, and the sharp conflicts over the question among the lower courts, the Fifth Circuit's decision stands in marked contrast to the proper comity analysis and treaty construction performed by some other federal and state courts. In essence, the Fifth Circuit has ruled that the Hague Evidence Convention is "optional" and may be disregarded whenever the United States court seeks to compel production of evidence from abroad, provided that the evidence is within the control of a party subject to the court's jurisdiction and provided that the actual physical production of the evidence takes place within the territory of the United States. Such an interpretation contravenes the apparent intent of the parties to the Convention and robs the Convention of its potential role in ameliorating the international conflicts created by United States courts' exercise of jurisdiction to order discovery from abroad.[28]

A. *The Hague Evidence Convention Cannot Properly Be Interpreted as an Optional Means of Obtaining Evidence from the Territory of Signatory States.*

Several courts in the United States, confronted with requests for discovery that attempt to avoid the procedures of the Hague Convention, have required the parties seeking the evidence from abroad to use only Hague

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[28] "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States. Some 15 states [as of 1984] have adopted legislation expressly designed to counter U.S. efforts to secure production of documents situated outside the United States . . . ." Restatement of U.S. Foreign Relations Law (Revised), Tent. Draft No. 6 (Vol. 1) (Apr. 12, 1985), p. 333.

Convention procedures.[29] As the court in *Cuisinarts* observed, "[t]he ratification of the Convention brings to a climax years of efforts in the United States by those interested in modernizing and improving international and judicial assistance. Neither in the language of the Convention itself nor in any official communique regarding the effect of the Convention is there any indication that the U.S. Delegation[,] or any other party to the Convention, viewed the document as optional in nature." [30] Some of the principal signatories to the Convention have subsequently indicated their understanding that, absent bilateral or other multilateral understandings, Convention procedures were to be the exclusive means of obtaining evidence from abroad for use in civil proceedings.[31]

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[29] *Worthington v. Polymer Machinery Corp.*, No. 83-2131 (E.D. Pa. Jan. 12, 1984); *Rockwell Int'l Corp. v. Construzioni Aeronautiche Giovanni Augusta, S.P.A.*, No. 81-3984 (E.D. Pa. May 17, 1983) (order *reversing* order of Mar. 21, 1983); *Cannon v. Arburg Maschinenfabrik*, No. 80 L 2275 (Ill. Cir. Ct. July 21, 1983); *Kantor v. Cycles Peugeot, S.A.*, No. 81-0423 (D.R.I. Apr. 14, 1982) (memorandum and order); *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 (Conn. Super. Ct. July 22, 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention); *Langhans v. Johns-Manville Sales Corp.*, No. 535530-7 (Cal. Super. Ct. Aug. 25, 1981) (minute order); *Croxton v. Johns-Manville Sales Corp.*, No. L-6001-79 (N.J. Super. Ct. May 20, 1980).

[30] *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 at 7 (Conn. Super. Ct. July 22, 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention).

[31] For example, the government of the Federal Republic of Germany has repeatedly expressed its view that the Convention is exclusive. *See* German *Anschuetz* Brief at 5-9. The French Senate and National Assembly, angered by American litigants' disdain for Convention procedures, have made it a criminal offense to request or transmit certain evidence for use in a foreign proceeding in a matter unauthorized by the Hague Convention or other international treaty. *See* Herzog, *The 1980 French Law on Documents and Information*, 75 Am. J. Int'l L. 382 (1981).

Indeed, it is difficult to see why countries such as Germany agreed to compel their citizens to provide evidence to United States courts if it was not in exchange for some limitations on the methods or scope of United States discovery from abroad.[32]

The reluctance of the court below, like most U.S. courts, to accept the exclusivity of Convention discovery procedures stemmed in significant part from its conclusion that to require plaintiffs to seek needed evidence through Hague Convention procedures would be tantamount to denying them the discovery they need for a full and fair adjudication of their claims. This conclusion was wrong for two reasons.

First, the court of appeals unjustifiably and erroneously assumed that plaintiffs would not obtain the evidence they required if they proceeded under the Convention. The court based this assumption largely on the fact that Germany in signing the Convention exercised its right under Article 23 to say that it would not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries. 754 F.2d at 612 (App. A at 20a). But this reservation was not intended to preclude U.S. litigants from obtaining needed documentary evidence from abroad,

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[32] *See* Amram, The Proposed Convention on the Taking of Evidence Abroad, 55 A.B.A. J. 651 (1969) ("In 1964 [four years before the Hague Evidence Convention was negotiated] Rule 28(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1781 and 1782 were amended to offer to foreign countries and litigants, without a requirement of reciprocity, wide judicial assistance on a unilateral basis for the obtaining of evidence in the United States"); Oxman, *supra* n. 11 at 760 (". . . one may argue that if the Convention does not restrict unilateral extraterritorial discovery methods, then the civil law countries received no meaningful quid pro quo for their concessions to the United States under the Convention").

but rather to prevent discovery of a "fishing nature." [33] Moreover, the court below ignored the explicit undertakings of the German government narrowly circumscribing the situations in which the execution of a letter of request may be refused (Hague Evidence Convention, Art. 12, App. E at 51a) and committing the German courts to undertake in good faith to implement any legitimate discovery request (*id.*, Art. 9, App. E at 50a). And, of course, nothing in the German government reservation affects requests for written or oral testimony from abroad.

But even if it were certain that litigants such as the plaintiffs here could not obtain some particular piece of documentary evidence they needed, there is a second reason why treating the Convention as mandatory would not, as the Fifth Circuit claimed, "give foreign litigants an extraordinary advantage in United States courts." 754 F.2d at 606 (App. A at 7a). The Convention in no way prevents courts from protecting the integrity of their factfinding procedures by (1) excluding evidence when the opposing party cannot test its probative value through examination of underlying and related evidence located abroad or (2) drawing adverse inferences from a party's failure to produce voluntarily evidence located abroad. Indeed, U.S. courts may impose a variety of non-punitive sanctions, including judgment of default on the record, upon a foreign litigant unwilling to comply with discovery requests. The Convention deals not at all with what a U.S. court does to decide a case based on the evidence provided or not provided to it.[34] Instead, in our

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[33] *See* Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 *Int'l Legal Materials* 1417, 1421 (1978).

[34] For example, under the heading "Matters Excluded From the Convention," the following appears in the Explanatory Report of the Rapporteur: "A proposal to regulate the effect of the refusal of a witness to appear and testify before a consul or commissioner was not approved. This is a matter for the domestic law of the

submission, it restricts only the Court's ability to compel, upon pain of monetary fines or other punishment for contempt, the production of evidence located abroad in the territory of a Convention state.[35]

B. *A Proper Comity Analysis Compels Resort To the Procedures of the Hague Convention in the First Instance by United States Courts.*

If, upon examination, this Court decides that the Hague Evidence Convention does not provide the exclusive procedures in civil cases for discovery of evidence located abroad in the territory of contracting states, then U.S. courts should at least be required to exhaust Convention procedures before resorting to other means of discovery potentially offensive to foreign governments. The Fifth Circuit's determination that the Convention need not be employed, even in the first instance, so long as the documents or testimony are ordered to be produced in the United States, is the result of a faulty analysis of what the principle of comity requires.

Under the principle of comity, U.S. courts seek to accommodate important sovereign interests of other nations, as expressed in those nations' legislative, executive, or judicial acts, where such accommodation can be achieved consistent with the rights of U.S. citizens and others under the protection of U.S. laws.[36] In the

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forum where the action is to be tried. The judge in charge of the trial may decide what inferences may be drawn from the failure of a party, or of a witness not a party, to give evidence." Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* reprinted in *Message from the President Transmitting the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, S. Exec. A, 92d Cong., 2d Sess. (1972) at 41.

[35] *See Societe Internationale v. Rogers*, 357 U.S. 197, 209-10 (1958) (discussing distinction between a default judgment entered as "mere punishment" and one entered as the result of a "permissible presumption" arising from failure to produce evidence); Moore's Federal Practice ¶ 37.03[2] at 59-62 (1984).

[36] *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

discovery area, courts have developed from this general principle of comity the particular rules that foreign discovery ordinarily should be sought by the least intrusive means available, that discovery will be ordered from abroad in defiance of the will of foreign sovereigns only to the extent it is strictly necessary, and that generally U.S. sources of evidence should be exhausted before foreign sources are tapped. By a parity of reasoning, comity requires that the procedures of the Hague Evidence Convention for obtaining evidence from foreign sources be exhausted before resorting to the alternative of U.S. domestic discovery procedures, both because the alternative is accurately viewed by other nations as invading their sovereign interests and because requiring such exhaustion will not substantially impair the rights of U.S. litigants.

In a civil law state such as Germany, the evidence-gathering function is placed in the hands of the courts in order to ensure that discovery will be conducted consistently with the state's jurisprudence governing the occasions and conditions upon which coercive governmental power is invoked to compel disclosure of normally private information. This jurisprudence balances, for the general welfare of the foreign state, the conflicting interests implicated by compelled disclosure of information for use in legal proceedings. That balance is necessarily upset, and the state's jurisprudence is necessarily revised, to the extent that information held in the foreign sovereign's territory by nationals of that sovereign is subject to disclosure by orders framed according to the dictates of an alien jurisprudence—as, for example, where Germany or other civil law countries would recognize a privilege (*e.g.*, for a business secret) or mandate a procedure (*e.g.*, examination of a deponent by a judge) not required by the United States or other common law countries. Hague Convention procedures are thus a vital mechanism for providing the foreign state with the opportunity to participate, through its courts,

in the discovery process and to help frame an accommodation between the foreign state's legal principles and the U.S. discovery request.

It is no answer to the concerns of foreign governments to say, as the court of appeals did in the present case, that foreign sovereign interests are not implicated because, with production of the evidence occurring in the United States, no governmental act is being performed in the foreign country. Because states such as Germany have declared their sovereign interest in determining when and under what circumstances private information will be divulged under coercion, it violates that sovereign interest for a U.S. court to order production of witnesses and documents on pain of sanctions just as surely as if officers of the court were physically present in Germany overseeing the production.

On the other hand, any putative U.S. interest in disregarding the Hague Convention procedures, and thus denying the foreign court an opportunity to participate in and inform the discovery process, is relatively weak. Contrary to the suggestion of the court of appeals in this case, requiring exhaustion of Hague Convention procedures will not *ipso facto* mean that the requested discovery will not ultimately be compelled by the U.S. court, but rather only that such procedures will be used in the first instance. To be sure, in many cases the letter of request procedure may be somewhat more time-consuming or cumbersome than a direct discovery order to the foreign party, but that is often true of judicial processes that afford necessary protections to affected persons, such as notice and the opportunity to be heard. In those cases where foreign law or practice blocks some or all of the discovery, the foreign court will advise the United States court, pursuant to Article 13 of the Convention, "immediately" of the "reasons" why the request may not have been executed "in whole or in part." The United

States court, having the benefit of these reasons, can then decide what further action is required.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted to afford this Court the opportunity to define the role of the Hague Evidence Convention in U.S. litigation before federal and state courts alike.

Respectfully submitted,

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July 17, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-3286

IN RE ANSCHUETZ & Co., GmbH,
Petitioner

March 7, 1985

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John M. Rogers, Appellate Staff, Civ. Div., Justice Dept., Washington, D.C., for U.S.A.

Cornelius G. Van Dalen, New Orleans, La., for MS. River [*sic*].

James O.M. Womack, New Orleans, La., H. Lee Lewis, Jr., Houston, Tex., for Boh Bros.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before BROWN, TATE, and HIGGINBOTHAM, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Introduction

Anschuetz & Co., GmbH (Anschuetz), third party defendant in the United States District Court for the Eastern District of Louisiana, petitioned this court pursuant to Rule 21(a) of the Federal Rules of Appellate Procedure for a writ of mandamus ordering the district judge to vacate or stay various orders directing Anschuetz to (i) produce 11 or more of its employees for depositions in Germany; (ii) produce documents in New Orleans now located in Germany; and (iii) pay attorney's travel expenses for preliminary depositions in Kiel, Germany. Anschuetz opposes all of the foregoing as a violation of the Multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, done 18 March 1970 [1972], 23 U.S.T. 2555, T.I.A.S. No. 7444 (Hague Convention).[1]

After much reflection, we conclude that the Hague Convention does not supplant the application of the discovery provisions of the Federal Rules over foreign, Hague Convention state nationals, subject to *in personam* jurisdiction in a United States Court.

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[1] The Convention was adopted in October of 1968 to provide a uniform system of discovery in foreign jurisdictions. It was based on the framework established by the Multilateral Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, done 15 November 1965, [1969], 20 U.S.T. 361, T.I.A.S. No. 6638. The United States ratified the treaty in 1972. West Germany's participation did not take effect until June 1979.

The Hague Convention is presently in force among Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Gibraltar, Israel, Luxembourg, Norway, Portugal, Singapore, Sweden, the United Kingdom, and the United States.

I.

In January of 1979, the M/V POLA DE LENA, then owned by Naviera Santa Catalina and chartered to Compania Gijonesa de Navegacion, S.A.,[2] collided with the Gretna Ferry Landing and two ferry boats owned by the Mississippi River Bridge Authority. The Mississippi River Bridge Authority then filed suit against the M/V POLA DE LENA and Gijonesa. The suit was later consolidated with another case and eventually included as plaintiff the Mississippi River Bridge Authority, owner of the facility and the two ferry boats, Landis Construction Company, and Boh Brothers, Inc., contractors responsible for construction work on the Landing. Settlements have been reached with the Mississippi River Bridge Authority and with Landis—Gijonesa and Anschuetz reserving all rights against each other. Boh Brothers remains a party.

Gijonesa filed a third party complaint against Anschuetz, a German corporation, alleging the failure of a steering device designed by Anschuetz as a contributing cause of the accident. Anschuetz denied the jurisdiction of the court, but the district court ruled that Anschuetz was subject to the court's jurisdiction pursuant to the Louisiana long-arm statute.[3]

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[2] These two companies have since merged and the surviving defendant and third party plaintiff will be referred to as Gijonesa.

[3] La.Rev.Stat.Ann. § 13.3201 (West 1968). Foreign-based companies that choose to conduct business within the United States are, of course, amenable to the jurisdiction of American courts and are simply not clothed with the immunity of the foreign government under whose laws they may have been organized. *See, e.g., United States v. First National City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 521 (E.D.Pa. 1984); *cf. Societe Internationale v. Rogers*, 357 U.S. 197, 211-12, 78 S. Ct. 1087, 1095-96, 2 L.Ed.2d 1255 (1958). Even foreign governments may be sued in American courts for actions undertaken in their commercial capacity in the United States. *See generally* 28 U.S.C.A. §§ 1330, 1602 *et seq.; Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 1968-69, 76 L.Ed.2d

Anschuetz then sought to bring in third party Empressa Nacional De Bazan (Bazan), the shipyard in Spain which had built the vessel and installed the steering device. Bazan also denied the jurisdiction of the Louisiana district court and all proceedings were halted for approximately two years while the jurisdictional fight with Bazan went forward.[4] Eventually the district court ruled that Bazan was not subject to the court's jurisdiction.

In October of 1983, Gijonesa amended its complaint to allege product liability claims against Anschuetz and embarked on a round of discovery involving interrogatories, requests for production, and notices of depositions. In January of 1984 Anschuetz moved for a protective order with respect to the interrogatories, requests for production of documents, and notices of deposition. Anschuetz argued that the discovery was overbroad and should be limited in scope. Anschuetz also argued that Gijonesa was afforded the opportunity to examine Anschuetz personnel at the 1981 depositions in Spain and should not be entitled to "another bite at the apple." In its motion Anschuetz did not rely on the Hague Convention. Moreover, the motion stated that "Anschuetz has offered to have Gijonesa's counsel or other representative examine Anschuetz' files in Germany."

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81 (1983); *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 84 (2d Cir. 1983); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 307-15 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982), and if amenable to United States substantive law, are presumably also subject in those proceedings to American procedural law. *International Society for Krishna Consciousness v. Lee* [No. 75 Civ. 5388 (Sept. 11, 1984 S.D.N.Y.)].

[4] In November and December 1981, pursuant to an order of the United States Magistrate, Anschuetz and Gijonesa deposed a number of persons, including employees of Anschuetz and Gijonesa, in Spain. Spain is not a party to the Hague Convention.

In February of 1984, the United States Magistrate, following two discovery conferences, ordered Anschuetz to comply with most of Gijonesa's discovery demands. Anschuetz witnesses were apparently examined in Germany in early April of 1984. On April 18, Anschuetz moved for a protective order based on the Hague Convention to stop the depositions scheduled to take place in Germany on May 2, 1984. The magistrate denied this motion. Anschuetz appealed to the district judge. The judge upheld the magistrate's denial of the motion. He also refused a § 1292(b) petition for certification. We stayed the magistrate's discovery order pending resolution of the alleged conflict between the Hague Convention and the Federal Rules of Civil Procedure. In order that all relevant views be before us, we invited amicus curiae briefs from the Federal Republic of Germany and our own Department of Justice.[5]

By way of summary, the German government has stated that the taking of oral depositions in Kiel, Germany, and the production of documents located in Kiel, would be a violation of German sovereignty unless the order is transmitted according to a letter of request as specified in the Hague Convention. The Department of Justice contends that the Hague Convention is not the exclusive method of obtaining evidence and that the district court's order regarding document production does not conflict with any treaty obligation of the United States under the Convention. The Department, however, urges a careful comity analysis be employed by courts before departing from the mechanisms of the Convention. It is also the Department's position that a district court's ordering of depositions to be conducted on German soil is a violation of the international law obligations of the United States.

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[5] The court wishes to express its thanks to both the German Government and the Department of Justice for the filing of briefs detailing their respective positions on the Hague Convention.

II.

Since this is the first time a circuit court has considered the interplay between the Hague Convention and the Federal Rules, we will examine the relevant cases in a systematic fashion in order that our line of reasoning be clear for all to follow.

(a)

Anschuetz, in effect, argues that international comity is promoted and the judicial sovereignty of West Germany preserved, if the discovery orders and sanctions against it are voided and Gijonesa is forced to conduct its discovery under German internal law and procedure following the Hague Convention.[6] In support of its argument, Anschuetz cites: *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D.Pa.1983); *Schroeder v. Lufthansa German Airlines*, No. 83C1928 (N.D.Ill. Sept. 15, 1983); *Volkswagenwerk A.G. v. Superior Court*, 123 Cal.App.3d 840, 176 Cal.Rptr. 874 (1981); *Pierburg GmbH & Co. v. Superior Court*, 137 Cal.App.3d 238, 186 Cal.Rptr. 876 (1982). These cases have required litigants to rely upon the Hague Convention for pretrial discovery, reasoning that international comity is thereby promoted. *Schroeder* and *Philadelphia Gear* relied heavily on the two decisions of the California Court of Appeals.

In *Volkswagenwerk*, a products liability suit arising out of an automobile accident, the trial court entered a detailed discovery order providing for on-site inspection of Volkswagen's plant in Germany. In its careful opinion,

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[6] The Convention procedure for discovery is to send a "letter of request" to a designated judicial authority in Germany which would then execute the request with the aid of its particular compulsory measures if necessary. Article 9 of the Convention states that such request "shall be executed expeditiously."

the California Court of Appeals directed that the trial court vacate its order, holding that the plaintiff should be required to proceed under the Hague Convention not as a matter of international law, but as a matter of judicial self-restraint. The court's primary concern was the on-site discovery proceeding which the trial court had ordered to take place within West Germany. In *Pierburg*, another automobile products liability suit where the court denied discovery requests, the court relied heavily on *Volkswagenwerk* and an earlier case, *Volkswagenwerk A.G. v. Superior Court*, 33 Cal.App.3d 503, 109 Cal. Rptr. 219 (1973). These cases considered a trial court's order that the discovery proceedings take place in Germany. In essence, the California Court of Appeals ruled that allowing plaintiffs to serve interrogatories on a West German defendant would destroy the Hague Convention.

We do not find these cases to be well reasoned. Indeed, none of the cases relied upon by Anschuetz indicate in any way that the purpose of the Convention was to restrict the exercise of *in personam* jurisdiction by United States courts over foreign nationals properly before it. Anschuetz' interpretation of the treaty, taken to its logical conclusion, would give foreign litigants an extraordinary advantage in United States courts. Insofar as Anschuetz seeks discovery it would be permitted the full range of free discovery provided by the Federal Rules. But when a United States adversary sought discovery, this discovery would be limited to the cumbersome procedures and narrow range authorized by the Convention. Further, we believe that requiring domestic litigants to resort to the Hague Convention to compel discovery against their foreign adversaries encourages the concealment of information—a result directly antithetical to the express goals of the Federal Rules and the Hague Convention which aim to encourage the flow of information among adversaries.

(b)

Gijonesa is on more solid ground in its contention that the Hague Convention is not exclusive.[7] In *Cooper Industries v. British Aerospace*, 102 F.R.D. 918 (S.D.N.Y. 1984), the plaintiff sought the production of certain documents that the defendant asserted were not in its possession. The court ruled that the defendant waived any right to claim protection under the Hague Convention because the defendant had made no effort to seek protective relief when the discovery request was served. After failing to comply with the initial discovery demand, defendant raised the argument that the discovery of the documents in the hands of its British affiliate must be conducted under the procedures of the Hague Convention—reasoning that the British affiliate was a foreign corporation and not a party to the action. The court followed established precedent when it held that "[d]ocuments need not be in the possession of a party to be discoverable, they need only be in its custody or control."[8]

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[7] Indeed, the federal courts which have considered the issue since the filing of supplemental briefs in the case before us have all agreed that the Hague Convention is not the exclusive method for obtaining discovery from a foreign party in domestic litigation. While some of these cases have taken the position that a comity balancing is required before resorting directly to the Federal Rules, all agree that the Federal Rules remain viable against a foreign party; *Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 49 (D.D.C. 1984); *McLaughlin v. The Fellows Gear Shaper Co.*, 102 F.R.D. 956, (1984 E.D.Pa.); *International Society for Krishna Consciousness, Inc. v. Lee*, 425 F.Supp. 681 [No. 75 Civ. 5388 (Sept. 11 (1984) S.D.N.Y.)]; *Adidas (Canada) Ltd. v. S/S SEATRAIN BENNINGTON*, [80 Civ. 1911 (May 30, 1984) S.D.N.Y.].

[8] *Cooper Industries v. British Aerospace*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984); *Fleming v. Gardner*, 84 F.R.D. 217, 217-18 (E.D. Tenn. 1979); *Hubbard v. Rubbermaid, Inc.*, 78 F.R.D. 631, 635-37 (D. Md. 1978); *Advance Labor Service, Inc. v. Hartford Accident and Indemnity Company*, 60 F.R.D. 632, 633-34 (N.D.Ill. 1973).

In *Cooper Industries* the court ruled that the documents were within the defendant's custody because the defendant sold and serviced planes to which the documents, mostly service manuals and blueprints, related. Essentially the defendant was the distributor and servicer in the United States of planes manufactured by its British affiliate. The court stated that "the documents plaintiffs seek all relate to the planes that defendant works with every day; it is inconceivable that defendant would not have access to these documents and the ability to obtain them for its usual business." [9]

As the *Cooper* court pointed out, "the fact that documents are situated in a foreign country does not bar their discovery." *Marc Rich & Co. v. United States*, 707 F.2d 663, 667 (2d Cir.1983) (grand jury investigation), *cert. denied*, —— U.S. ——, 103 S.Ct. 3555, 77 L.Ed.2d 1400; *United States v. First National City Bank*, 396 F.2d 897, 900-01 (2d Cir.1968) (grand jury investigation). The court in *Cooper*, also observed:

> The production demanded here does not infringe on British sovereignty as it calls merely for documents, not a personal appearance. Defendant cannot be allowed to shield crucial documents from discovery by parties with whom it has dealt in the United States merely by storing them with its affiliate abroad. Nor can it shield documents by destroying its own copies and relying on customary access to copies maintained by its affiliate abroad. If one defendant could so easily evade discovery, every United States company would have a foreign affiliate for storing sensitive documents.

Cooper at 920.

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[9] *Cooper Industries v. British Aerospace*, 102 F.R.D. 918, 919-20 (S.D.N.Y. 1984). The documents and records that a corporation requires in the normal course of its business are presumed to be in its control unless the corporation proves otherwise. Any other rule would allow corporations to improperly evade discovery. *In Re Ironclad Manufacturing Co.*, 201 Fed. 66, 68 (2d Cir. 1912).

One of our difficulties with Anschuetz' argument was highlighted by the court in *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (1984). The court was asked to consider the applicability of the Hague Convention after the defendant had already answered two sets of interrogatories without raising any effect of the Convention.[10] As the court in *Murphy* stated, "the Convention procedure does not appear to be trouble free. Perhaps its most glaring fault . . . is that Germany has exercised its right not to execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries." *Murphy* at 361.

The court in *Lasky v. Continental Products Corp.*, 569 F.Supp. 1227 (E.D.Pa.1983), began its analysis of the effect of the Convention on the conduct of domestic lawsuits seeking discovery abroad with the observation that the Convention is not necessarily inconsistent with the Federal Rules of Civil Procedure. The *Lasky* court reasoned that the language of the Convention is permissive rather than mandatory.[11] From this observation the court concluded that foreign parties and domestic parties are equally subject to the Federal Rules of Civil Procedure so long as personal jurisdiction is gained. Thus, discovery could go forward under the federal rules and the Convention would be applicable only if compliance with the requested discovery would violate foreign law or other-

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[10] Whether the Hague Convention must be timely asserted or is thereby waived is a question we do not decide.

[11] The court in *Lasky* cited Article 27 of the Convention in support of its conclusion that the Convention is permissive. Article 27 states that the Convention "shall not prevent a contracting state from . . . permitting by internal law or practices, methods of taking evidence other than those provided for in this Convention." We find this language somewhat ambiguous, not necessarily a license to compel alternative modes of discovery.

wise impinge upon foreign sovereignty. 569 F.Supp. at 1228-29.[12]

(c)

We agree with the court in *Murphy* when it said "although the courts that have considered the issue have come to different conclusions as to the ultimate effect of the Convention, they argue that compliance is not mandatory but rather a matter of comity." *Murphy* at 363. The cases cited by Anschuetz may be further explained by the possibility that the California Court of Appeals felt more obliged to yield to the supremacy of a federal treaty over state laws, *see Pierburg*, 186 Cal.Rptr. at 882, whereas the *Lasky* and *Murphy* courts were confronted, as we are, with the federal rules and a federal treaty on an essentially equal footing.

Moreover, the scope of the discovery sought in the California state court cases was significantly broader—thus creating a greater potential for intrusion upon German sovereignty—than in the case before us. In *Pierburg & Volkswagenwerk* the requesting party sought on-site inspections, photography, depositions, informal interviews, and access to the defendant's technical library. In *Lasky*,

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[12] Of course, the federal rules and a federal treaty are essentially on equal footing. The Federal Rules of Civil Procedure have the force and effect of federal statutes. *United States for Use of Tanos v. St. Paul Mercury Insurance Co.*, 361 F.2d 838 (5th Cir. 1966), *cert. denied*, 385 U.S. 971, 87 S.Ct. 510, 17 L.Ed.2d 435 (1966); *Association for Retarded Citizens of North Dakota v. Olsen*, 561 F.Supp. 495 (D.N.D. 1982), affirmed and modified, 713 F.2d 1384 (8th Cir. 1983). In many circumstances, conflict of such laws may be resolved by applying a last in time rule causing the most recent law to supersede. *Vorhees v. Fischer and Kleche*, 697 F.2d 574 (4th Cir. 1983); *United States ex rel. Martinez-Angosto v. Mason*, 232 F.Supp. 102 (S.D.N.Y. 1964). In this instance, however, where ratification of the Hague Convention occurred after adoption of the federal rules, but before the 1980 and 1983 amendments to those rules, none of which mentioned the Convention, we decline to make such an apparently arbitrary ruling.

as here, plaintiffs seek primarily written answers to interrogatories and production of certain documents.[13]

This distinction is significant in deciding Anschuetz' comity claim because comity is largely a function of the relative interests between overlapping jurisdictions.

> Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

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[13] We are aware, of course, that the distirct court in sustaining the magistrate's ruling, has ordered depositions. But where the district court's order is an order that discovery will be compelled only in the United States, there can be no invasion of German sovereignty. Depositions given voluntarily by German nationals for their convenience on German soil, when subject to a district court's *in personam* jurisdiction, do not implicate the Hague Convention. The district court clearly realized this:

> COURT: Having jurisdiction upon and over Anschuetz, then this triggers the usual Rules of Federal Civil Procedure.
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> COURT: I have personal jurisdiction over Anschuetz. Anschuetz is obliged to designate those persons who are its agents or officers for 30(b)(6) purposes, and to provide them for the taking of a deposition. In an effort to accommodate Anschuetz and to minimize expenses, the depositions were set in Germany. Anschuetz could just as well be required to produce that corporate officer or other witness in the United States.
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> COURT: We have a party, we have jurisdiction, and under Rule 34 that party is required to produce documents which are in its possession, custody or control. I don't think there is any doubt but that Anschuetz's documents involved in this matter are under its control. The fact that the documents are in West Germany is, to this Court, immaterial.
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Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C.Cir.1984); *United States v. First National Bank*, 699 F.2d 341, 345-47 (7th Cir.1983); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1288-91 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981).

As the court in *Murphy* noted, "[t]he United States has a clear interest in facilitating the manner in which foreign citizens doing business in the United States are available for litigation here. West Germany has a clear interest in protecting the integrity of its judicial rights and procedures, but we find that interest less compelling in this instance than, for example, where a non-party witness is sought for deposition or where the scope of discovery sought involves more intrusive methods." *Murphy* at 373. This reasoning applies fully to Anschuetz' petition for mandamus. Having been found reachable under the Louisiana long-arm statute, Anschuetz is subject to the Federal Rules discovery provisions.

The Federal Rules of Civil Procedure provide for the taking of deposition evidence abroad in a manner stipulated in writing by the parties;[14] on notice before a person authorized to administer oaths at the place of the examination, either under a local law or American law;[15] or before a person specially commissioned by the court to administer the oath.[16] *See* 4 Moore's *Federal Practice* ¶¶ 28.03-.04, .06. Depositions from unwilling witnesses may be taken pursuant to the provisions authorizing the issuance of letters rogatory.[17]

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[14] F.R.Civ.P. 29.

[15] F.R.Civ.P. 28(b)(1).

[16] F.R.Civ.P. 28(b)(2).

[17] F.R.Civ.P. 28(b)(3). Although the cooperation of an unwilling foreign deponent is insured by local courts acting upon a letter rogatory, execution of the letter in the first instance rests upon

Under the Hague Convention, papers may be served, interrogatories propounded, and other documents necessary for the prosecution of a trial obtained from one contracting nation by another.[18] The Convention specifies that when a party fails to secure a witness' voluntary cooperation by notice or commission procedure, it may seek discovery via a letter rogatory—a letter of request from an American judge for the assistance of foreign judicial authority.[19]

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principles of international comity, and is in that sense discretionary with the issuing American courts. *See* 4 Moore's *Federal Practice, supra,* ¶ 28.05.

[18] For a more detailed description of procedures under the Hague Evidence Convention, *see* Note, Taking Evidence Outside of the United States, 55 B.U.L.R. 368, 381-85 (1975).

[19] As noted, the principal purpose of the Convention was to alleviate difficulties encountered by litigants in common law countries. *See, e.g.,* Amram, 55 A.B.A.J. at 652; United States Delegation Report, 8 International Legal Materials at 806-08; Hastings L.J. at 1251; B.U.L.Rev. at 380. The focus of concern was that such litigants often needed the cooperation of the foreign government in order to obtain the requested discovery and, in the absence of some binding agreement requiring such assistance, their ability to obtain the information in question would be severely hampered or entirely stymied.

This problem would, of course, only occur with respect to discovery procedures actually undertaken in the foreign country, and most typically against an individual or entity not subject to the jurisdiction of the American court and therefore not amenable to any form of American judicial compulsion. Not surprisingly, then, the convention itself is entitled "Convention on the Taking of Evidence Abroad . . ." and is, on its face, addressed solely to the procedures to be used for the gathering of evidence within the borders of countries other than those in which the legal proceeding is pending.

That the Convention was not intended to limit the application of any country's laws with respect to the obtaining of evidence within its geographic jurisdiction is further underscored by the repeated statements found both in the body of the Convention and in the commentaries of its drafters that it was intended to supplement or improve available methods of discovery and not to limit

Although the Hague Convention provides a mechanism whereby the recipient nation's executing authority is required to assist an American court with such compulsory force as its own courts could exercise in a pretrial evidentiary situation,[20] numerous exceptions to this international obligation do exist[21] which potentially bar a let-

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them. The Convention preamble states its purposes as being "to facilitate the transmission and execution of letters of request and to further the accommodation of different methods which [the signatory states] use for this purpose. . . ." Such letters of request, both under the Federal Rules of Civil Procedure, and under other and prior authority, have been used to obtain foreign government assistance, where necessary, in the obtaining of information abroad. *See, e.g., Leasco Data Processing Equipment Corp. v. Maxwell*, 63 F.R.D. 94 (S.D.N.Y. 1973); *United States v. Paraffin Wax*, 23 F.R.D. 289 (E.D.N.Y. 1959); *Branyan v. Koniklijke Luchtvaart Maatschappij*, 13 F.R.D. 425 (S.D.N.Y. 1953); *De Villeneuve v. Morning Journal Association*, 206 Fed. 70 (S.D.N.Y. 1913). No authority has been suggested for the notion that letters of request were ever used or requested to be used to enable litigants to obtain information within the very country in which they are litigating.

If resort to letters rogatory for domestic discovery was not necessary before the Convention, it assuredly is not required after its ratification. As noted by Philip Amram, who was the reporter for the committee that drafted the Convention, the Convention "makes no major changes in United States . . . procedure and requires no major changes in United States . . . legislation or rules." *Amram*, 55 A.B.A.J. at 655. *See also* the Report of the United States Delegation, noting that "the Convention is a major contribution to the elimination of formal and technical obstacles to securing evidence abroad" and that its advantages will "far outweigh the minor adjustments and procedure that may be required." 8 Int'l Legal Materials at 820. *International Society for Krishna Consciousness v. Lee* [No. 75 Civ. 5388 (Sept. 11, 1984 S.D.N.Y.)].

[20] Art. 10 of the Hague Convention states:

> In executing a letter of request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

[21] Art. 12(b) of the Convention, for example, specifies that execution of a letter of request may be refused if "the state addressed

ter of request from being successfully executed at all.[22] For example, foreign judicial cooperation may be withheld altogether if the discovery assistance requested is deemed prejudicial to state sovereignty.[23] Furthermore, even when discovery abroad is available, the breadth of evidence ordinarily expected from a fullfledged American deposition might be restricted for any number of reasons: the foreign states' own procedures might limit or foreclose cross-examination, full participation of counsel might not be allowed, or a verbatim record might not result, thus limiting admissibility of the testimony in an American court.[24]

In *Graco v. Kremlin, Inc.*, 101 F.R.D. 503, 519 (1984), the court stated:

> It cannot be denied that foreign displeasure with American discovery procedures played some part in

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considers that its sovereignty or security would be prejudiced thereby." Art. 23 of the Convention further states that any contracting state may "declare that it will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries." This reservation, inserted at the request of the United Kingdom, has been made by every contracting state except the United States. *See* Report on the Work of the Special Commission on Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 17 I.L.M. 1425, 1427 (1978).

[22] Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l. & Comp. L.Q. 646 (1969).

[23] Hague Evidence Convention, Art. 12(b). Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l. & Comp. L.Q. 646 (1969); Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, 8 Int'l. Legal Materials 785, 804, 806 (1969).

[24] *See* Borell & Boyd, Opportunities for and Obstacles to Obtaining Evidence for Use in Litigation in the United States: in France, 13 International Law 35, 40-41 (1979); *see* Carter, Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures, 13 International Law 5, 15 (1979).

> shaping the convention, but it is a mistake, the court believes, to view the convention as an international agreement to protect foreign nationals from American discovery when they are parties properly before American courts. Two important purposes of an international convention of this type relate to discovery of nonparties, and would justify the convention's existence regardless of how the convention is deemed to apply with respect to parties before the court. First, a non-party witness may be willing to be deposed at home, but may be unwilling to travel to the country in which the litigation is proceeding. Since some countries would consider the taking of evidence within their borders a usurpation of judicial prerogative, an international agreement setting up a framework for seeking and granting permission has great value, allowing evidence to be taken without afront to local authorities. Second, an unwilling non-party witness simply cannot be reached, if outside the court's jurisdiction, unless authorities in the witness' state use their authority to compel the giving of evidence. An international agreement provides a framework for the invocation of a foreign authority's compulsory powers, making accessible evidence which otherwise would not have been accessible. A multistate convention, rather than a series of two state agreements, confers the added benefit of standardized procedures.

Graco at 519-20.

We agree with the court's conclusion in *Graco* that "the convention was [not] intended to protect foreign parties, over whom an American court properly has jurisdiction, from the normal range of pretrial discovery available under the Federal Rules of Civil Procedure." We find particularly apt the court's observation that the Convention does not require deference to a foreign country's judicial sovereignty over documents, people,

and information—if this is really how civil law judicial sovereignty is understood—when such documents are to be produced in the United States. As *Graco* held, "discovery does not 'take place within [a state's] borders' merely because documents to be produced somewhere else are located there. Similarly, discovery should be considered as taking place here, not in another country, when interrogatories are served here, even if the necessary information is located in the other country." [25]

In essence, matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention. As the court reasoned in *Adidas (Canada) Ltd. v. S/S SEATRAIN BENNINGTON*, 80 Civ. 1911 (May 30, 1984 S.D.N.Y.):

> What is required of Les Toles on French soil is certain acts preparatory to the giving of evidence. It must select appropriate employees to give depositions in the forum state: likewise it must select the relevant documents which it will reveal to its adversaries in the forum state. These acts do not call for French judicial participation. If Les Toles were preparing to bring litigation against United States adversaries in the United States courts, it would perform the same acts of selecting employee witnesses and evidentiary documents from its files without participation by an French judicial authority. In no way do those acts affront or intrude on French sovereignty.

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[25] The logic of this position seems equally compelling with respect to people residing in another country. If they are subject to the court's jurisdiction, or if the court can compel a party to produce them under F.R.C.P. 37(d), then the court may order that they be produced for deposition; and violation of the other country's judicial sovereignty can be avoided by ordering that the deposition take place outside the foreign country.

The true ramifications of this discovery dispute extend far beyond the issue at stake in the case immediately before us. International commercial litigation involving nationals of signatories to the convention is not at all infrequent. Such litigation does not generally require a court to order that foreign property be inspected, or that a deposition take place in a foreign country—but interrogatories and document requests, directed at information or evidence located in the foreign country, are a necessary and routine part of almost every case. Requiring that such discovery be processed through foreign authorities would work a drastic and very costly change in the handling of this type of litigation. We agree with the *Graco* court's conclusion that "nothing in the text of the Convention remotely suggests that the Convention was intended to have this wide ranging effect."

It seems patently obvious that if the Convention were interpreted as preempting interrogatories and document requests, the Convention would really be much more than an agreement on taking evidence abroad. Instead, the Convention would amount to a major regulation of the overall conduct of litigation between nationals of different signatory states, raising a significant possibility of very serious interference with the jurisdiction of United States courts.

> The solicitude for the judicial sovereignty of civil law countries shown in *Schroeder*, *Philadelphia Gear*, and *Pierburg* apparently is unmatched by any recognition that they are suggesting a starting limitation on the sovereign powers of this country, as expressed through its courts. Treating the Convention procedures as exclusive would make foreign authorities the final arbitors of what evidence may be taken from their nationals, even when those nationals are parties properly within the jurisdiction of an American court.

Graco at 522.

We find that Article 23 illustrates well that the text of the Convention is not consistent with the broad interpretation given in *Schroeder*, *Philadelphia Gear*, and *General Electric*, and that its provisions plainly are inadequate to sustain the burden which Anschuetz' broad interpretation would place upon them. Article 23 states in full:

> a contracting state may at the time of signature, ratification or accession, declare that it will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries.

The United States delegation reported that "Article 23 permits a state to refuse to execute a letter, issued to obtain pretrial discovery of documents." [26] Under the better reasoned view, Art. 23 allows states to limit the scope of evidence taking for which they will employ their compulsory powers on behalf of foreign courts, but it does not give foreign authorities the significant prerogative of determining how much discovery may be taken from their nationals who are litigants before American courts. Under the view apparently taken in *Schroeder*, *Philadelphia Gear*, and *General Electric*, Art. 23 would give foreign authorities this power over the conduct of litigation in American courts. It would be unfathomable for an international treaty to make such power a matter for any state's optional, unilateral declaration. Furthermore, the imprecise and general wording of the permitted declaration is wholly inconsistent with the tremendous importance it would carry under the interpretation urged by Anschuetz. While it is conceivable that the United States could enter into a treaty giving other signatories control over litigation instituted and pursued in Ameri-

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[26] Report of the United States Delegation to the Eleventh Session of Hague Conference on Private International Law, 8 International Legal Materials 785, 804, 808-09 (1969).

can courts, a treaty intended to bring about such a curtailment of the rights given to all litigants by the federal rules would surely state its intention clearly and precisely identify crucial terms.

(d)

A further reason this court is unpersuaded by the cases cited by Anschuetz is that they clearly suggest that foreign officials' rulings, in executing letters of request, are subject to being overridden by the issuing American court. In other words, if West German authorities did not sufficiently temper their Art. 23 declaration by recognizing a duty of good faith, then the course contemplated in these decisions is for the American court to order the requested discovery anyway under the Federal Rules of Civil Procedure. In our view, the greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure.[27] We do not believe the Convention's language dealing with judicial cooperation should be elevated to the status of the exclusive method of conducting discovery abroad. Such a result is neither good statutory interpretation, nor demanded by principles of international comity.[28] As the

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[27] Similarly, the court in *Schroeder* reserves the right to impose sanctions if dissatisfied with the foreign national's compliance with the letter of request. Depending on the circumstances, this might involve an even more offensive second guessing of the foreign authority's execution of the letter of request.

[28] We find further support in the reasoning expressed by the court in *Compagnie Francaise d'Assurance v. Phillips Petroleum Company*, [81 Civ. 4463-CLB, slip op. at 10-12 (January 25, 1983) S.D.N.Y.]:

> A finding that the production of documents is precluded by foreign law does not conclude a discovery dispute. A United States court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign

court emphasized in *Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 48 (D.D.C. 1984):

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sovereign's views to the contrary. *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197, 204-06, 78 S.Ct. 1087, 1091-92, 2 L.Ed.2d 1255 (1958); *United States v. First National City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968); *United States v. Vetco*, 644 F.2d 1324, 1329 (9th Cir.), *cert. denied*, [70 L.Ed.2d 639] 102 S.Ct. 671 [454 U.S. 1098] (1981). Plaintiffs have urged this court to defer to the French statute and to decline to order the requested discovery.

In fact, it is suggested that we are *required* to do so, because Articles 11 and 21 of the Hague Convention on the Taking of Evidence Abroad would permit a party confronted with a statute such as Article 1 to refuse to give evidence. Because the United States is a signatory to the Convention, the argument continues, this court is bound by its provisions and must also permit plaintiff to refuse to produce the documents. In essence, plaintiffs argue that the articles of the Hague Convention withdraw from this court the right to employ the discovery devices provided in the Federal Rules of Civil Procedure because they conflict with the provisions of French Law No. 80-538.

The Hague Convention, signed by both France and the United States, is an international treaty and as such is entitled to be recognized as part of the supreme law of the land. United States Constitution, Art. 6, Cl. 2, The Federal Rules of Civil Procedure, duly enacted by Congress, are also part of the supreme law of the land. Absent a direct conflict, our duty is to enforce them both. Nothing in the legislative history of the Hague Convention nor in the congressional proceedings at the time of its adoption, suggest that Congress intended to replace, restrict, modify or repeal the federal rules. Indeed, Phillip Amram, a member of the United States delegation to the 1968 session of the Convention, described its provisions as "a climax [of] more than a generation of effort . . . by those interested in modernizing and improving international judicial assistance," and stated it would affect "no major changes in United States procedure [nor require any] changes in U.S. legislation or rules." Amram, United States ratification of the Hague Convention on the taking of evidence abroad, 67 American Journal of International Law 104, 105 (1973).

Treaties should be construed so as to affect their purposes, *Reed v. Weiser* [*Wiser*], 555 F.2d 1079 (2d Cir.), *cert. denied*,

The provisions under the Hague Convention and the actions of the German authorities pursuant thereto, are in patent conflict with the Federal Rules of Civil Procedure and the rights which these rules grant to all litigants, including this plaintiff. The Federal Rules give to every litigant in a United States court very wide discovery rights. Thus, Rule 26 provides broad rights with respect to the taking of depositions; Rule 33 provides that interrogatories "shall be answered" by the party upon which they are served; and Rule 34 contemplates the broadest possible discovery and production of documents. Nowhere in these rules is there the slightest suggestion that a party properly before the court may not avail itself of these discovery rights against another party within the jurisdiction of the court merely because the documents sought or the persons to be deposed are not located in the United States. Indeed, the rules clearly contemplate their applicability abroad if the United States Court has jurisdiction.

III.

Of course, to say what is proper and permitted as an exercise of power by an American court acting under the federal rules is not necessarily to say that such a power should always be employed. Particularly in the realm of international discovery we believe the exercise of judicial power should be tempered by a healthy respect for the principles of comity.

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434 U.S. 922 98 S.Ct. 399, 54 L.Ed.2d 279 (1977), and to be as consistent, insofar as possible, with co-existing statutes, *Washington v. Fishing Vessel Association*, 443 U.S. 658, 690, 99 S.Ct. 3055, 3076, 61 L.Ed.2d 823 (1979). The goal of the Hague Convention was to facilitate and increase the exchange of information between nations. It would not serve this goal to transform its provisions into a means to frustrate the discovery process. We conclude, therefore, that this court is not required to defer to the French statute by virtue of the Hague Convention.

Though many of the reported decisions require resort to the Hague Convention as a matter of comity, none holds that the Convention is exclusive and therefore supersedes traditional discovery methods. We believe this is for good reason. Such a holding would be exceptionally adverse to United States' interests. It would allow foreign signatory states to determine the extent of extra-territorial discovery to be permitted by American courts. It does not require a Prometheus to foresee that United States litigants would soon find it impossible to obtain necessary discovery from foreign based parties.

The question remains whether, as a matter of comity, a United States court should order parties to proceed under the Convention before resorting to more traditional means of discovery. While there is no blocking statute [29] involved in the case before us, in its brief sub-

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[29] A blocking statute is a law passed by the foreign government imposing a penalty upon a national for complying with a foreign court's discovery request. France and Britain have passed blocking laws aimed at discovery in American antitrust suits. These statutes are also known by the descriptive moniker: clawback provisions.

It is not *ipso facto* a defense to a discovery request that the law of a foreign country may prohibit production or disclosure. As the Eleventh Circuit held in *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, —— U.S. ——, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983), even at the sanction stage, violation of foreign law is not necessarily a valid defense to a lawfully issued subpoena for documents. *See also, Arthur Anderson & Co. v. Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976); cert. denied, 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543 (1977). Restatement (Second) Foreign Relations Law of the United States § 39. A fortiori it is not a defense at this discovery juncture.

If the foreign law has in fact prevented the litigant from providing the information despite a United States court order, the good faith of the discovered party is relevant to the sanctions that may be imposed for noncompliance with the court order, *see e.g., Societe Internationale v. Rogers*, 357 U.S. at 205-06, 209-13, 1092-93, 1094-96. *In re Westinghouse Elect. Corp. Uranium Contracts Litigation*, 563 F.2d at 996-97, but this does not detract from the

mitted at our invitation, the German government has expressed its opinion that "[c]ompliance in Germany with the order of the U.S. District Court mandating . . . the production of documents located in Kiel, Germany, would be a violation of German sovereignty unless the order is transmitted and executed by the method of Letter of Request under the Convention."

Of course, it is for us to determine the extent of American treaty obligations. This question is one of federal law to be determined by the intent of the parties to the treaty. The evidence of that intent is found in the language of the treaty itself. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982).

Unlike the Hague Service Convention, which expressly provides that it is exclusive,[30] the Hague Evidence Convention contains no express provision for exclusivity. In addition, extraterritorial discovery has been a standard practice of American courts for some time, and there is no evidence that the American negotiators, the Department of State, or the Congress intended to prohibit the practice.[31] In fact, the Senate Report emphasized that the Convention was intended to improve, not thwart, the means for securing evidence abroad.[32]

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authority of the court to order such discovery to take place. *International Society for Krishna Consciousness v. Lee* [No. 75 Civ. 5388 (Sept. 11, 1984 S.D.N.Y.)].

[30] Art. 1 of the Service Convention (20 U.S.T. at 362) provides: "The present Convention shall apply in all cases in civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad.

[31] Oxman, The Choice between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention, 37 U. Miami L. Rev. 733, 760 (1983).

[32] Amran, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in

> [The Convention] makes no major changes in United States procedure and requires no major changes in United States legislation or rules. On the other front, it will give the United States courts and litigants abroad enormous aid by providing an international agreement for the taking of testimony, the absence of which has created barriers to our courts and litigants.[33]

We hold that the Hague Convention is to be employed with the involuntary deposition of a party conducted in a foreign country, and with the production of documents or other evidence gathered from persons or entities in the foreign country who are not subject to the court's *in personam* jurisdiction. The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules. So long as discovery is sought for the identity and qualifications of witnesses there is no basis to suggest that supplying this information amounts to obtaining evidence in Germany. If the discovery sought by Gijonesa of Anschuetz in Germany becomes particularly intrusive or is contemplated for persons not subject to the court's jurisdiction, then the court may order the parties to conduct that discovery under the Hague Convention.

It is our opinion that the district court retains the power to order a litigant from whom discovery is sought, and who is subject to *in personam* jurisdiction, to produce the evidence upon pain of sanctions. The question is whether the district court should always exercise its power to the full extent permitted by the federal rules.

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message from the President transmitting the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. A., 92d Cong. 2d Sess. 1, 3 (1972).

[33] *Id.* at 5.

Since we stayed all discovery orders pending our consideration of the possible conflict between the Hague Convention and the Federal Rules, and as a result new discovery orders must now be promulgated, we believe the district court in fashioning its discovery procedure should reconsider all orders in the light of the principles expressed in this opinion. The district court should remember that Anschuetz may make available any documents and witnesses in Germany if this is more convenient to the parties without implicating German sovereignty. If Anschuetz is not voluntarily forthcoming in Germany, the court can order the production of documents and the examination of witnesses to occur in the United States to avoid any infringement upon German sovereignty. The full range of sanctions available in the federal rules remain applicable to any party subject to the court's *in personam* jurisdiction.

As we are confident that the district court will willingly follow the principles expressed in this opinion, there is no need for the issuance of a mandamus order or a determination of whether the court abused its discretion in the orders previously issued.

MANDAMUS DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 79-470 c/w 79-492

SECTION "K"

MISSISSIPPI RIVER BRIDGE AUTHORITY, A CORPORATE BODY WITHIN THE DEPARTMENT OF TRANSPORTATION & DEVELOPMENT, STATE OF LOUISIANA

Versus

M/V POLA DE LENA, HER ENGINES, ET CETERA, IN REM, *et al*

RULING ON MOTION OF ANSCHUETZ
FOR REVIEW OF DISCOVERY ORDERS
HEARD ON APRIL 13, 1984

Before: THE HONORABLE GEORGE ARCENEAUX, JR.
United States District Judge

New Orleans, Louisiana.

APPEARANCES:

For Boh Brothers Construction Company:

MESSRS. BURKE & MAYER
Attorneys at Law
1600 One Shell Square
New Orleans, Louisiana 70139
(BY: JAMES O. M. WOMACK)

For Anschuetz & Co., GmbH:

MESSRS. MILLING, BENSON, WOODWARD, HILLYER, PIERSON & MILLER
Attorneys at Law
1100 Whitney Bank Building
New Orleans, Louisiana 70130
(By: NEAL D. HOBSON)

For Navera Santa Catalina, S.A.; CIA Gijonesa de Navegacion, S. A.:

MESSRS. CHAFFE, MCCALL, PHILLIPS, TOLER & SARPY
Attorneys at Law
1500 First National Bank of Commerce Building
New Orleans, Louisiana 70112
(BY: CAMPBELL E. WALLACE)

RULING

THE COURT: First of all, I'm going to deny the motion initially on the basis that it's untimely filed. All the matters about which mover complains transpired back in February, on February 16 by minute entry by Magistrate Fonseca. The March 23 order deals essentially with sanctions in an effort to accommodate Anschuetz. There is a sanction, of course, about the expenses of an attorney representing Gijonesa to take preliminary depositions, et cetera, in Germany. But as the Court understands this, this was done as a means, really, to convenience Anschuetz, and not in order to trigger the provisions, or require the assistance of German judicial authority in any respect.

In any event, the real complaint as to whether or not any discovery of documents and/or 30(b)(6) officers should take place arises from the February 16 order of the Magistrate, and not the March 23 order. It seems to me that what the mover is doing is attempting to collaterally attack the February 16 order by using the

March 23 sanctions order as a step-ladder to climb to the ceiling provision it should, perhaps, have been back in February of this year. Now, just to be abundantly safe, and in the event that some reviewing authority should find that that finding is incorrect then I'm going to say that, in my opinion, the Hague Convention does not apply to this particular circumstance. Involved herein are two kinds of discovery matters. First of all, a 30(b)(6) deposition of an officer or agent of Anschuetz; and, second, the production of certain documents which have been specifically identified after a tortuous and thorough hearing by the Magistrate.

It's the position, of course, of Anschuetz, as has been amply demonstrated in oral argument, that anytime a foreign defendant, in this case a West German corporation, is a party to a proceeding in United States courts, and anytime documents, for example, are needed to be produced which are physically located in Germany, the United States courts, despite their jurisdiction over the German national party, must, as a mandatory matter, use the provisions and apply the provisions of the Hague Convention. The Court does not read the Hague Convention that way. The preface to the Convention itself recites in the second paragraph, "Desiring to improve mutual judicial cooperation in civil or commercial matters," and then Chapter 1, Article 1, dealing with letters of request—and the letters of request, as the Court perceives this treaty, are the treaty equivalents of the old letters rogatory, with some broadening, because they are broad enough to include not the old letters rogatory only, but also commissions and the other discovery devices permitted under American law.

But Article 1 says, "In civil or commercial matters—of course, this is an admiralty matter, and the drafters of the treaty have not done us the favor of defining whether civil and commercial includes maritime or admiralty matters, but assuming for the purposes of this discussion that they do—"a judicial authority of a con-

tracting state may, in accordance with the provisions of the law of that state"—and, of course, that's set forth in 28 U.S.C. 1782, et seq, insofar as the provisions are concerned as supplemented by the subsequent provisions and procedural requirements required by the treaty—"request the competent authority of another contracting state by means of a letter of request to obtain evidence or to perform some other judicial act." Now, in order to trigger the entire treaty, it seems to me that what we have to have is a request from a contracting state, from a judicial authority of a contracting state, for example, this Court asking the competent authority of another contracting state, that is, some authority in Germany, and the state authorities defined in the treaty and the German ratification to obtain evidence. The Court does not feel that it's necessary under these circumstances to do this.

First of all, the article itself is cast in permissive terms, may, not shall. Secondly, this Court has previously found that it has jurisdiction over Anschuetz. It has personal jurisdiction over Anschuetz by virtue of the transaction of business in Louisiana, and specifically in New Orleans, by Anschuetz through its wholly-owned subsidiary and, as I recall the facts, certain consignment sales, as well as other matters more fully referred to in my opinion, which for purposes of law presented a presence in Anschuetz in this district, and in this state, and in this country sufficient for this Court to exercise its jurisdiction. Having jurisdiction upon and over Anschuetz, then this triggers the usual Rules of Federal Civil Procedure. I don't have to read counsel Rule 30 (b) (6) dealing with depositions of parties. I have personal jurisdiction over Anschuetz. Anschuetz is obliged to designate those persons who are its agents or officers for 30(b) (6) purposes, and to provide them for the taking of a deposition. In an effort to accommodate Anschuetz and to minimize expenses, the depositions were set in Germany. Anschuetz could just as well be required

to produce that corporate officer or other witness in the United States.

The big fight, it seems to me, is over Rule 34, production of documents. Because, as counsel for Anschuetz has so ably argued, if the treaty is mandatory, and if it is applicable, then under no circumstances could its provisions ever be used in order to provide, quote, pre-trial discovery of documents as known in common law countries, close quote, and I refer you to Article 23 of the treaty. That article, incidentally, provides that a contracting state may, at the time of signature, ratification, or accession, declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries. When the West German government assented to this treaty, it exercised that right of reservation. So what we have, it seems to me, as I've tried to extract from counsel in argument, and which counsel very diligently attempted to avoid concluding, is that if the treaty is mandatory insofar as discovery of any defendant German cooperation is concerned, then under no circumstances could there ever be discovery of materials, pre-trial discovery of documents, under that reservation.

Now, this, I'm sure, would be certainly the fact in the event that this Court called upon a West German court to exercise its authority in order to compel, in Germany, from someone not a party defendant, or otherwise a party to a proceeding in this court, pre-trial documents, which, as to the reservation, the West Germans are not obliged to comply with.

But that's not the case we have here. We have a party, we have jurisdiction, and under Rule 34 that party is required to produce documents which are in its possession, custody or control. I don't think there is any doubt but that Anschuetz's documents involved in this matter are under its control. The fact that the documents are in West Germany is, to this Court, immaterial. The Court has jurisdiction over Anschuetz. Anschuetz can

produce the documents in the United States, and be subject to our discovery provisions. The treaty was not designed to create a Chinese wall among nations. It was designed to facilitate the securing of evidence among various nations, giving due deference to the various differences which exist within their judicial systems.

The Court does not believe that it's mandatory, nor does the Court even believe that it's applicable where the Court has in personam jurisdiction over a non-party defendant insofar as Rule 34 is concerned, and insofar as Rule 30(b)(6) is concerned. I'm frank to say that, in the event that a deposition was required from a non-30(b)(6) witness, the treaty would have to be applied in order to secure that deposition testimony, if indeed the deposition testimony was to be taken. Or if I were to send, or any court send, a commission, that would be subject to the provisions of the rule; or if letters rogatory were sent to someone not a party, or to some person who is an agent of a party, but who might have in his personal possession, as opposed to its corporate possession, some relevant document, I think the Court would have to proceed on the basis of the treaty to secure these. But to say that the combination of Rule 5, which permits service of motions and discovery motions and so forth on counsel of record, Rule 34, which requires a party to produce records which are in his possession, custody or control, subject, of course, to protective order of the Court, or Rule 30(b)(6) which requires that a private corporation who is a party designate one or more officers, directors or managing agents to testify, and to permit them to testify pursuant to the discovery provisions, are all subject to the Hague Convention, to this Court makes no sense at all.

The Court has personal jurisdiction over Anschuetz. The Court intends to enforce the provisions of the Federal Rules of Civil Procedure as to this party over which it has jurisdiction to the same extent that it would enforce those rules against any party over which it has

jurisdiction. The motion, accordingly, will, therefore, be denied on that ground. Thank you, gentlemen.

MR. HOBSON: Your Honor, there is one more question. In speaking with Mr. Wallace this morning, he's indicated that he intends to take depositions of approximately twelve additional Anschuetz witnesses.

THE COURT: If they aren't 30(b)(6) witnesses, he can't get them. Now, how he's going to get them is something else. You're going to object to the Magistrate issuing a commission to someone in Germany to take those depositions, I feel confident. Now, I can order you to present those people in the United States. There is a hard way and an easy way to do everything. I'm not going to have this Court's discovery schedule further frustrated. Either they can be stipulated to with full reservation, if you wish, and the depositions done in Germany, or Anschuetz can bring the deponents over here, if, indeed, they are 30(b)(6) witnesses. If they are not, that, gentlemen, is a different ballgame, and you are confronted with the same problems you would have if you were trying to serve a discovery subpoena on a stranger in the United States. You've got to invoke the judicial process, and you've got to invoke it through the German authorities, through the medium of the Hague treaty.

But I'm going to be perfectly frank with you, that if there is any further frustration of the Court's discovery procedure which the Court finds to be willful, I am going to have no hesitancy at all about striking defenses. This has been around since 1979. Anschuetz has been a party since 1980. As I understand the basic facts, Anschuetz has settled at least in part, with certain other parties. It presently has ongoing litigation with Bazan in Spain. And the only thing that I can figure that is going on is a calculated and designed program for delay. How, for what reasons, it may be to get the Spanish litigation done, or it may be for others. But I'm not going

to countenance any further delay in this matter, and if I find any unjustifiable delay on the part of Anschuetz, I'm going to have no compunction about striking their defenses.

MR. HOBSON: Judge, I understand. I don't think it's fair to say that Anschuetz has been involved in delay. The delay that has been involved here a long time, as your Honor knows, is a long and unsuccessful attempt to bring Bazan into this litigation. We felt that all issues should be settled. That involved a two-year slowdown because of what was going on. We have not sought any further postponements of the trial, and do not intend to, at this point in any event.

THE COURT: I noted the reservation, "at this point."

MR. HOBSON: I don't ever want to close any doors. We're not contemplating anything at this time.

THE COURT: I understand.

MR. WALLACE: Your Honor, just briefly, the depositions that were taken in Germany were fundamentally to identify the proper 30(b)(6) witnesses, and in various lines of questioning we went through and asked who at Anschuetz today is the best person to talk and testify about this subject matter. And we asked repeatedly. We identified ten or twelve witnesses, probably each witness' deposition would not last longer than an hour or two hours, if they are in fact necessary. We're going to try to take a minimum of two or three depositions, and if these others are necessary, we would go forward with those, your Honor. But from our examination of Anschuetz as a corporation, they identified these witnesses to be the proper 30(b)(6) witnesses. Thank you.

THE COURT: Anything further, counsel?

MR. WOMACK: Your Honor, James Womack for Boh Brothers. If I might say something, we have no real interest in the continuing discovery problem.

THE COURT: Except insofar as the continuing litigation is concerned.

MR. WOMACK: Well, your Honor, we don't want this to be later an excuse for their inability to obtain discovery from Boh Brothers in an attempt to delay the trial one more time. We have notified both parties that we are ready to go to trial in July, and if they have any further discovery that they need against Boh Brothers, that they should go ahead and do it now, and not wait until they have resolved their present difficulties.

THE COURT: Let me say a hearty amen to that. This case is going to go to trial in July. It's been around too long. Everybody knows it. Everybody generally is familiar with the basic facts. We've got proofs to bring on to support them. But the case will go to trial in July. I hate to use this term in the record, but I shall, come hell or high water, and I hope we confront neither. Thank you, counsel.

REPORTER'S CERTIFICATE

I, Delmer R. Simpson, CSR, Official Court Reporter for the United States District Court for the Eastern District of Louisiana, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the ruling of the Court had in the within-entitled and numbered case on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Delmer R. Simpson
DELMER R. SIMPSON, CSR
Official Court Reporter

MINUTE ENTRY
ARCENEAUX, J.
April 23, 1984

CIVIL ACTION NO. 79-470
SECTION "K"

MISSISSIPPI RIVER BRIDGE AUTHORITY

Versus

M/V POLA DE LENA, ETC., *et al.*

Having reviewed and considered the motion for appeal from discovery ordered by the magistrate, submitted by defendant Anschuetz & Co., GmbH., this Court notes the following:

At a special hearing for review of discovery orders on April 13, 1984, this Court, after comprehensive review of pertinent case law, statutes and supporting memoranda, held that the rules of the Hague Convention on the taking of evidence abroad in civil and commercial matters, 28 U.S.C. § 1781, do not affect this Court's ability to enforce discovery procedures as authorized by the Federal Rules of Civil Procedure. In its ruling from the bench, this Court referred to its opinion of November 26, 1980, wherein the Court determined that personal jurisdiction over Anschuetz was proper. Therefore, this Court concluded that Anschuetz is subject to all provisions of the Federal Rules of Civil Procedure, including FRCP 30 B(6).

Accordingly, IT IS ORDERED that the motion for special hearing filed April 19 by Anschuetz is hereby DENIED.

/s/ J. Arceneaux

APPENDIX C

MINUTE ENTRY
FONSECA, M.
March 21, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number 79-470 c/w 79-492
SECTION "K"(4)

MISSISSIPPI RIVER BRIDGE AUTHORITY

Versus

M/V POLA DE LENA, ETC., *et al.*

HEARING ON MOTION

APPEARANCES:

Neal Hobson, Esq., and Ken Leggett, Esq., for Anscheutz Campbell Wallace, Esq., and Derek Walker, Esq., for Gijonesa

MOTION:

(1) Motion by Gijonesa to take deposition by telephone

(2) Motion by Gijonesa for sanctions

(3) Motion by Anschuetz for extension of time within which to answer interrogatories

.....: Continued to

.....: No Opposition

.....: Opposition

.....: Local Rule 3.11, 3.12, 3.13

ORDERED

.....: Dismissed as moot

.....: Dismissed for failure of counsel to appear

3 : Granted

2 : Denied

1 : Other—Anschuetz shall pay the expenses for one attorney representing Gijonesa to travel to Germany to take preliminary depositions to ascertain general information regarding Anschuetz personnel with knowledge of the subject matter of this litigation. Such depositions shall take place not later than April 6, 1984.

/s/ RONALD A. FONSECA
United States Magistrate

APPENDIX D

FEDERAL RULES OF CIVIL PROCEDURE

Rule 30. Depositions Upon Oral Examination

(a) When Depositions May be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination: General Requirements; Special Notice; Non-Steneographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

* * * *

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so desig-

nated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

APPENDIX E

MULTILATERAL

Taking of Evidence Abroad

Convention adopted at the Eleventh Session of The Hague Conference on Private International Law October 26, 1968;

Opened for signature at The Hague March 18, 1970;

Signed on behalf of the United States of America July 27, 1970;

Ratification advised by the Senate of the United States of America June 13, 1972;

Ratified by the President of the United States of America July 15, 1972;

Ratification of the United States of America deposited with the Ministry of Foreign Affairs of the Netherlands August 8, 1972;

Proclaimed by the President of the United States of America September 15, 1972;

Entered into force with respect to the United States of America October 7, 1972.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, adopted at the Eleventh Session of The Hague Conference on Private International Law on October 26, 1968, was opened for signature at The Hague on March 18, 1970, and was signed for the United States of America on July 27, 1970, the text of which in the French and English languages is annexed;

The Senate of the United States of America by its resolution of June 13, 1972, two-thirds of the Senators present concurring, gave its advice and consent to the ratification of that Convention;

The President ratified the Convention on July 15, 1972, and the instrument of ratification was deposited with the Ministry of Foreign Affairs of the Netherlands on August 8, 1972;

Article 37 of the Convention provides that it shall enter into force on the sixtieth day after the deposit of the third instrument of ratification; and

The Convention accordingly will enter into force for the United States of America on October 7, 1972, instruments of ratification having been deposited by Denmark and Norway on June 20, 1972 and August 3, 1972, respectively;

NOW, THEREFORE, I, Richard Nixon, President of the United States of America, proclaim and make public the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to the end that it shall be observed and fulfilled with good faith on and after October 7, 1972 by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this fifteenth day of September in the year of our Lord one thousand nine hundred seventy-two and of [SEAL] the Independence of the United States of America the one hundred ninety-seventh.

RICHARD NIXON

By the President:

WILLIAM P ROGERS
Secretary of State

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

CHAPTER I—LETTERS OF REQUEST

ARTICLE 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

ARTICLE 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

ARTICLE 3

A Letter of Request shall specify—

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to the obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia—

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

ARTICLE 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

ARTICLE 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

ARTICLE 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter

shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

ARTICLE 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

ARTICLE 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

ARTICLE 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

ARTICLE 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by

its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

ARTICLE 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

ARTICLE 12

The execution of a Letter of Request may be refused only to the extent that—

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

ARTICLE 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to

the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

ARTICLE 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II—TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

ARTICLE 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he repre-

sents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

ARTICLE 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if—

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

ARTICLE 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

ARTICLE 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

ARTICLE 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

ARTICLE 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

ARTICLE 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence—

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evi-

dence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

ARTICLE 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III—GENERAL CLAUSES

ARTICLE 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining

pre-trial discovery of documents as known in Common Law countries.

ARTICLE 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

ARTICLE 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

ARTICLE 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

ARTICLE 27

The provisions of the present Convention shall not prevent a Contracting State from—

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

ARTICLE 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from—

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

ARTICLE 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905 [1] and the 1st of March 1954, [2] this Convention shall replace Articles 8-16 of the earlier Conventions.

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1 99 *British Foreign and State Papers* 990.

2 286 UNTS 265.

ARTICLE 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

ARTICLE 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

ARTICLE 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

ARTICLE 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

ARTICLE 34

A State may at any time withdraw or modify a declaration.

ARTICLE 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following—

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

ARTICLE 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

ARTICLE 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

ARTICLE 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ARTICLE 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice[1] may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

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[1] TS 993; 59 Stat. 1055.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

ARTICLE 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.[1]

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

ARTICLE 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affiairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

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[1] Extended to Guam, Puerto Rico, and the Virgin Islands pursuant to notification sent by the American Embassy at The Hague on Feb. 6, 1913.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

ARTICLE 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following—

(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Articles 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed the present Convention.

DONE at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.